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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 613

THE DEUTSCH COMPANY,

Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY OF PETITIONER TO THE BRIEF IN OPPOSITION.

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SUBJECT INDEX

PAGE

Introduction 1

Argument 3

1. The Supreme Court should grant the petition for certiorari because the National Labor Relations Board interprets the law to allow the Board to refuse to receive and consider evidence of the status of the Union, the conflicting claims of several Unions, and the abandonment and dissolution of one of the Unions 3

2. The petition for certiorari should be granted because the National Labor Relations Board arbitrarily abandoned its own rules by failing to receive and consider relevant evidence in determining the unit appropriate for purposes of collective bargaining 6

3. The Supreme Court should grant the petition for certiorari to prevent the National Labor Relations Board from establishing a principal that it may hold a certification election while representation proceedings are still pending 7

Conclusion 9

TABLE OF AUTHORITIES CITED

Cases	Page
Baker and Taylor Co., 109 N.L.R.B. 245	7

Federal Regulations

Code of Federal Regulations, Title 29, Sec. 102.68	8

Statutes

Administrative Procedure Act, Sec. 6(d)	8
Administrative Procedure Act, Sec. 8(b)	8
Labor-Management Reporting and Disclosure Act of 1959, Sec. 2(b)	5
Public Law 86-257 (73 Stats. 519)	5
United States Code, Title 5, Sec. 1005(d)	8
United States Code, Title 5, Sec. 1007(b)	8

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Petitioner respectfully files its Reply to Respondent's Brief in Opposition, submitting that the Petition for Certiorari should be granted for the reasons stated therein and as follows:

Introduction.

The issue now before the Supreme Court is whether the Court should grant the Petition for Certiorari and determine whether the National Labor Relations Board deprived the employees of The Deutsch Company of due process of law by denying them their right to choose their collective bargaining representative. The Board is

the instrument by which the employees make their choice. The Board should not be an advocate of its own vested interest; it is required to act fairly in affording all parties a full hearing. Where, as here, the Board contends that the law allows it to act without receiving and considering relevant evidence, the Supreme Court should examine fully this interpretation of the law.

The indulgence of this Court is respectfully asked to consider this Reply to the Board's Brief in Opposition. The Board has rested its opposition to the Petition on a misunderstanding of the issues. Equally important, the Board's counsel, through inadvertance in reviewing the Record with which they are not personally familiar, have misstated the facts. This Reply is to correct these discrepancies in order that the Supreme Court may view the significance of the cause as worthy of its full consideration.

ARGUMENT.

1. The Supreme Court Should Grant the Petition for Certiorari Because the National Labor Relations Board Interprets the Law to Allow the Board to Refuse to Receive and Consider Evidence of the Status of the Union, the Conflicting Claims of Several Unions, and the Abandonment and Dissolution of One of the Unions.

The Board contends that it can decide the issue of the schism in the Union without a full hearing on the subject. It never received or considered any of the evidence offered by Petitioner [R. 96-101]. The Board misconceives this issue to be whether or not it improperly denied a Motion to set aside its Order on the ground that the Union had ceased to exist (Opp. Br. 2). Until the Board had heard that evidence, it could not decide the question of the existence of the bargaining representative. The Supreme Court should grant the Petition to clarify the important point of law requiring the Board to consider that evidence.

The Board's counsel are confused by the sequence of events. They state that the existence of the Union and its identity were not questioned in Petitioner's discussions with the Union (Opp. Br. 8). The question only arose after the decision by the Trial Examiner and the Board, when two Unions, each claiming to be the exclusive representative, demanded that bargaining be commenced with it [R. 96-98]. The officers and agents of the Union which appears to be the one certified have abandoned and dissolved it [R. 98-99]. The other claimant is not the certified union. The Petitioner made timely efforts

to bring this newly discovered evidence and change of circumstances, which occurred after the hearing, to the attention of the Board.

The Board concedes that this evidence might be relevant if Petitioner had raised the issue to justify non-compliance with the Board's order (Opp. Br. 8). Petitioner raised the issue for that specific reason.

Moreover, the Supreme Court has a greater reason for granting the Petition for Certiorari, because the Petitioner also questions the fairness of the Board's proceedings in making the Order without receiving and considering relevant evidence.

The Board is attempting to grant to itself the right to select a bargaining representative contrary to the desires of the employees for whose protection the law was drafted.

The Board would have this Court believe that the case is a routine dispute not worthy of its attention, in asserting that Petitioner never indicated any willingness to bargain with the certified Union. This assertion ignores the Employer's offer to bargain, as expressly stated in the Petition for Certiorari (Pet. 13-14) and on the record [R. 208-210]. But the Board and its counsel rejected the offer, and thus demanded that the employees surrender their statutory right to choose their own representative. The Board's arbitrary rejection of Petitioner's offer to bargain with a representative of its employees' choosing, further establishes the necessity for the Supreme Court to consider this issue.

The Board misconceives the applicable law because it fails to appreciate the significance of what really happened, which failure was the result of the Board's refusal to hear the relevant evidence. One group, claiming to be the representative, has been ousted from control of the Union for questionable conduct, and, having been restrained from acting for the Union [R. 102], has abandoned its offices and dissolved the Union. The other claimants were never elected to office in the first Union and seek recognition for a totally different Union, which never solicited or received the approval of the employees.

The crass dealing and trading of union membership aroused the present Congress to enact regulatory legislation which seeks to prevent breaches of trust, corruption and disregard for the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct (Labor-Management Reporting and Disclosure Act of 1959, Section 2(b); Public Law 86-257, 73 Stats. 519). The suspicious circumstances here are reminiscent of those which the Congress found necessary to prevent in order to protect the rights of the individual employees. If the Board refuses to take evidence of these circumstances, the rights of the employees will be lost. This case gives the Supreme Court an opportunity to decide the scope of the inquiry which the Board should conduct.

2. The Petition for Certiorari Should Be Granted Because the National Labor Relations Board Arbitrarily Abandoned Its Own Rules by Failing to Receive and Consider Relevant Evidence in Determining the Unit Appropriate for Purposes of Collective Bargaining.

The decision below would allow the Board to deprive The Deutsch Company and its employees of due process of law in failing to take evidence on and consider all of the relevant facts in connection with the matter of representation in conflict with the decisions in other Circuits (Pet. 23). This is not just another case where the facts were brought out in the Representation Hearing and litigated there finally, as the Board's counsel incorrectly observes.

Counsel for the Board has inadvertently misread the Record on this matter. Petitioner did not concede that the situation at the time of the Complaint Hearing was the same as at the time of the Representation Hearing (Opp. Br. 9). The subject of the exchange between the Trial Examiner and Petitioner's counsel regarding the existing situation pertained only to whether the job classifications were the same [R. 318-319]. It is inconceivable that the Board's counsel would have deliberately intended to imply that this exchange encompassed anything beyond its limited subject. This misunderstanding of the facts may explain counsel's failure to appreciate why this case warrants review by the Supreme Court.

The Court below enforced the Board's Order based on an incorrect statement of the law. The Board's counsel believes that the Trial Examiner rejected evidence which had already been heard in the Representation Hearing (Opp. Br. 9-10). But this is incorrect. The Trial Exami-

ner rejected newly discovered evidence of a change of circumstances which should have been considered. No evidence was introduced at the Representation Hearing in May of 1956, nor was any evidence available at that time, on the sentiment of the employees at either plant to determine their desires for separate representation [R. 247, 307-310, 319-320]. When the appropriateness of the unit was challenged at a Complaint Hearing in January, 1957, the Trial Examiner should have applied the legal principal that the issue warranted consideration of newly discovered evidence or any change in the facts underlying the situation at the time of the Representation Hearing.

Baker and Taylor Co., 109 N.L.R.B. 245 (1954).

This is a far cry from what the Board's counsel now characterizes as the "settled rule" (Opp. Br. 10). The Supreme Court should grant the Petition for Certiorari in order to prevent further application of the incorrect rule which the Board now believes to be "settled".

3. The Supreme Court Should Grant the Petition for Certiorari to Prevent the National Labor Relations Board From Establishing a Principal That It May Hold a Certification Election While Representation Proceedings Are Still Pending.

The purpose of an election is to obtain a fair expression of the desires of the employees. Where this has been prevented the result is a fraud on the rights of the employees to choose their own bargaining representative. The Board's counsel misunderstands the situation which confronted the employees. Counsel's argument loses its meaning when the true situation is disclosed.

Counsel assumes that Petitioner had notice that the Representation Hearings had been concluded by a denial

of its Petition for a Rehearing. In truth and in fact the record reflects that the only Notice to Petitioner and its counsel of the denial of the Petition for Reconsideration came on August 10, two days after the election. The telegrams are dated that day [R. 449-451]. The Trial Examiner conceded for the record that "oral notification by an employee of the National Labor Relations Board is not to be considered equal with receipt of formal notice insofar as receipt of formal notice may be required" [R. 329]. The law requires such notice. Administrative Procedure Act, Sections 6(d), 8(b); 5 U. S. C., Sections 1005(d), 1007(b); Title 29, Code of Federal Regulations, Sec. 102.68.

It is clear from the testimony of the witness Holzman that no notice, written or oral, had been received by The Deutsch Company up to the time of the election [R. 329]. The attempt by the Board's counsel to put other words in his mouth (Opp. Br. 10), is an erroneous statement of the Record, which was excusable only because counsel did not have the benefit of having heard the testimony as well as having quickly perused it. Holzman's speech to the employees [R. 357] further demonstrates the Counsel's improper conclusions.

The Board glosses over the real situation and argues it did not affect the employees' participation in the election (Opp. Br. 10). The result was that less than Forty Percent of the employees eligible to vote at the Avalon Plant cast ballots [R. 247, 350]. At the private consent election the participation was unanimous [R. 247]. The circumstances of the Board's election made it highly unlikely that the employees would respond to the call to express their preference. The reason lay solely in the Board's intransigent refusal to clarify the situation and afford

due process to the employees. Instead, the Board acted to force an unwanted collective bargaining representative on them.

Conclusion.

The irreconcilable conflict in the decisions of the Courts of Appeal on facts analogous to those here calls for a full hearing by the Supreme Court. The Board seeks to force an irresponsible, illegal and unacceptable representative on the employees and to conceal its highly prejudicial errors which have deprived the employees of due process in selecting their collective bargaining representative. This Court should grant the Petition for Certiorari to afford a full hearing on the merits.

Respectfully submitted,

LEON M. COOPER,

Counsel for Petitioner.